No. 83-1965.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,
v.
THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief of Amici Curiae The County of Seneca, New York; and the City of Rock Hill, The Town of Fort Mill and the Counties of York and Lancaster, South Carolina in Support of Counties of Oneida and Madison, New York.

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Statement of Interest of Amici Curiae.

A. *The County of Seneca, New York.*

The County of Seneca is a named defendant in a defendant class action commenced by the alleged Cayuga Indian Nation of

[1] All parties have consented to the filing of this brief. Moreover, in accordance with Sup. Ct. R. 36.4, for the purpose of filing this brief, the County of Seneca, New York, is sponsored by its county attorney, John M. Sipos. The County of York, South Carolina is sponsored by its attorney, Melvin B. McKeown, Jr. The County of Lancaster, South Carolina is sponsored by its attorney, James H. Hodges. The Town of Fort Mill, South Carolina is sponsored by its attorney, B. Bayles Mack. The City of Rock Hill, South Carolina is sponsored by its attorney, C.W.F. Spencer, Jr.

New York in the United States District Court for the Northern District of New York.[2] In that action, the plaintiffs assert a claim to approximately 62,000 acres of land in Seneca and Cayuga Counties in the State of New York. The plaintiffs also have declared their intention to claim in an action not yet filed an additional 3,000,000 acres of land, comprising a broad swath extending across New York State from Lake Ontario to the Pennsylvania border.

The land at issue in the pending *Cayuga* action is subdivided into thousands of separate tracts, each with its own unique history. These various tracts are individually owned by diverse entities, including families, churches, charitable organizations, trusts, manufacturers, public utilities, railroads, the State of New York, local governments and even persons who claim to be members of the plaintiff groups. The *Cayuga* plaintiffs themselves estimate the number of persons asserting an interest in the land at issue as exceeding 7,000 individuals and entities. All of the present owners acquired their holdings in ignorance of the allegedly illegal sales by the Cayugas to New York State which, like those at issue in the pending case, occurred nearly two centuries ago.

The action commenced by the Cayugas is predicated upon alleged violations of the same statutes involved in this action. The *Cayuga* plaintiffs allege that "from time immemorial" they owned and occupied the land at issue, and that their ownership was confirmed by certain treaties with colonial officials and later the United States. Closely parallel to this case, the essence of the *Cayuga* complaint is the assertion that the Cayugas transferred the land at issue to the State of New York in 1795 and 1807 by two treaties and that the transfers effected by those treaties were void for lack of approval or consent by the United States. The *Cayuga* plaintiffs allege that such approval or consent was required by those provisions of the comprehensive Indian Trade and Intercourse Acts regulating the transfer of Indian land and commonly known as the Nonintercourse Act. The *Cayuga* plaintiffs further allege that the interest of every one of the persons and entities who are members of the defendant class derives from those transfers to the State of New York and, therefore, the

[2] *Cayuga Indian Nation* v. *Cuomo*, Civil Action No. 80-CV-930, 80-CV-960 (N.D.N.Y., filed October 29, 1980). The alleged Seneca-Cayuga Tribe of Oklahoma has joined this action as plaintiff-intervenor. For convenience, both groups will be referred to as the "plaintiffs."

plaintiffs conclude, the titles and interests of these innocent landowners must similarly be void.

On April 26, 1982, the *Cayuga* defendants filed a motion to dismiss the complaint. Those defendants argued, *inter alia*, that no implied right of action exists under the Nonintercourse Act, that the plaintiffs stated no claim under the federal common law, that the plaintiffs' claims were barred by the most closely analogous state statute of limitation, and that the plaintiffs' claims were not justiciable and presented solely political questions. All of those arguments also are raised by the pending case. On May 26, 1983 the district court issued a Memorandum-Decision and Order rejecting the defendants' legal arguments and denying their motion to dismiss. *Cayuga Indian Nation* v. *Cuomo*, 565 F.Supp. 1297 (N.D.N.Y. 1983). In so holding, the district court placed great reliance on the decision of the United States Court of Appeals for the Second Circuit in another case involving the Oneida Indians. *Oneida Indian Nation* v. *New York*, 691 F.2d 1070 (2d Cir. 1982).[3]

Because some of the legal theories advanced and rejected in that case are identical to those presented on this review, the County of Seneca has an overwhelming interest in this case. If this Court were to reverse the court of appeals on the issues of whether the plaintiffs have a federal cause of action, whether any such action is time-barred, or whether the plaintiffs' claims present nonjusticiable political questions, the Court's decision would compel the *Cayuga* district court to reconsider and allow the defendants' motion to dismiss, thus freeing the thousands of acres of land and the thousands of good faith owners of those lands of the disruption and threat of pending and future Indian land claims.

B. *The City of Rock Hill, Town of Fort Mill, and Counties of York and Lancaster, South Carolina.*

The City of Rock Hill, Town of Fort Mill and Counties of York and Lancaster, South Carolina have a similar, vital interest in the outcome of this litigation. These political sub-divisions of the state of South Carolina, along with seventy-six individuals, companies and other public entities, have been named as defendants and representatives of an uncertified putative defendant class

[3] One of the affirmative defenses asserted by the *Cayuga* defendants in their subsequently filed answer is the defense of ratification, which also is one of the issues presented to this Court for review.

in an action commenced in the United States District Court for the District of South Carolina by the plaintiff Catawba Indian Tribe, Inc., a non-profit organization operated by persons claiming to be descendants of the Catawba Indians.[4] The plaintiff seeks to be declared the owner of approximately 144,000 acres (225 square miles) of land lying at the northern border of South Carolina in York and Lancaster Counties and encompassing the City of Rock Hill and the Town of Fort Mill. The plaintiff claims that the voluntary conveyance of this land in 1840 by the Catawba Indians violated the same statutes involved in this action and, as a result, seeks to dispossess more than 27,000 persons who currently assert an interest in the subject lands and to recover trespass damages for 140 years.

In pressing its claim, the plaintiff relies exclusively upon its right to assert a claim under those provisions of the Trade and Intercourse Acts regulating the transfer of Indian land. Specifically, the plaintiff claims that an 1840 transfer of land by the Catawba Indians to the State of South Carolina was void for lack of federal approval or consent which it alleges was required by these statutes. The plaintiff also alleges that because the interest of all persons and entities named as members of the defendant class derives from this transfer of land, all of these landowners' titles and interests are similarly void.

The disposition of the present action thus will have a substantial impact on the presently pending *Catawba* litigation. Should this Court hold that the Indian Trade and Intercourse Acts do not imply a private right of action, that the Oneidas' claims are time barred, or that the Oneidas' claims present nonjusticiable political questions, the pending *Catawba* litigation could be terminated with finality. Similarly, because the *Catawba* defendants contend that a 1959 federal statute implicitly ratified the challenged 1840 transaction, this Court's pronouncement on the doctrine of ratification could significantly influence the disposition of the *Catawba* claim. Accordingly, the City of Rock Hill, Town of Fort Mill and Counties of York and Lancaster, South Carolina join in this brief *amici curiae*.

[4] *Catawba Indian Tribe* v. *South Carolina*, No. 80-2050 (D.S.C., filed October 28, 1980). Upon commencement of this action, the defendants moved to dismiss the claim, asserting that a 1959 federal statute referred to as the "Catawba termination act," 25 U.S.C. §§ 931-938 had profoundly altered the status of the Catawba Indians and, as a matter of law, precluded their claim. Treating the motion as a motion for summary judgment, the district court allowed the defendants' motion and dismissed the action. Two members of a three judge panel of the Fourth Circuit Court of Appeals, over a strong dissent, reversed the lower court's ruling; however, the full Fourth Circuit subsequently granted the defendant's Petition for Rehearing *In Banc*, and, on June 4, 1984 heard oral argument.

Summary of Argument.

The panel majority's conclusion that the plaintiffs had asserted valid federal law claims premised on violations of the Nonintercourse Act rests upon several faulty assumptions. First, the panel majority incorrectly concluded that the federal common law historically has recognized a cause of action on behalf of Indian tribes for possession of or damages relating to tribal land. The decisions of this Court upon which the panel majority based its conclusion do not support the existence of a federal common law right which can be exercised by Indian tribes.

Moreover, by misplacing its focus on an inappropriate legal standard, and by wrenching the statutes out of their historical context, the panel majority failed to recognize that the comprehensive Indian Trade and Intercourse Acts have preempted any federal common law which might have existed. Because congressional intent to preempt federal common law need not be "clear and manifest," and because Congress, in enacting the Trade and Intercourse Acts, directly addressed the issues of remedies and enforcement, thereby occupying the field of Indian commerce, the panel majority erred in its failure to find that any federal common law was preempted.

The panel majority similarly erred in holding that an implied private cause of action on behalf of Indian tribes exists under the Nonintercourse Act. The panel majority inappropriately allowed its dissatisfaction with executive branch enforcement of the Act to affect its judgment in finding that an implied private cause of action exists. In addition, the panel majority misconstrued the significance of this Court's analysis of the Investment Advisers Act of 1940 in *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), which negates rather than supports the existence of an implied cause of action. The panel majority also failed to recognize that Congress enacted the Nonintercourse Act at a time when Indian tribes did not have direct access to federal courts. Finally, the panel majority disregarded the substantial evi-

dence that Congress' ultimate goal in enacting the Trade and Intercourse Acts was not the protection of Indian tribes but the preservation of peace on the American frontier, and that Congress delegated that responsibility to the executive, and not the judicial, branch of the federal government.

Even assuming *arguendo* that the panel majority's reliance on a federal cause of action were correct, however, it incorrectly found that the plaintiffs' claims were not barred by the applicable statute of limitations. Because no federal statute of limitations applies to Nonintercourse Act claims brought by Indian tribes, the court should have applied the most closely analogous state statute of limitations, which in this case would have barred the plaintiffs' claims. The panel majority's reliance instead on the federal statute of limitations which applies to actions brought by the United States finds no support in law or logic.

Finally, the panel majority erred in holding that federal ratification of an Indian land transfer sufficient to remove a conveyance from the Nonintercourse Act's restraints on alienation must be "plain and unambiguous." Other courts have correctly held that ratification could be inferred from the federal government's knowledge of and acquiescence in the transaction.

Argument.

I. The Panel Majority Erred in Concluding that the Plaintiffs Could Assert a Cause of Action Under Federal Common Law.

The panel majority incorrectly concluded that the plaintiffs could assert their claims under the federal common law. (App. 215a-19a). To reach this conclusion, the panel majority has wrenched out of context portions of decisions of this Court, exceeded the scope of any prior holding of this Court and created a new cause of action almost two centuries after the alleged wrong by applying legal principles contrary to those enunciated by this Court in *Milwaukee* v. *Illinois*, 451 U.S. 304 (1981).

A. *No Federal Common Law Cause of Action Ever Existed and the Panel Majority Erred in Creating One.*

As Judge Meskill recognized in his dissenting opinion, no court ever has held that an Indian tribe could maintain a federal common law cause of action for possession of or damages relating to tribal land. (App. 250a) ("There never has been, and this Court should not now create, a federal common law action.") Nevertheless, the panel majority finds support for the recognition of a new federal common law cause of action in isolated *dicta* from three of this Court's decisions. None of these cases holds or requires that federal common law recognize a cause of action for recovery of tribal lands.

The first two cases upon which the panel majority relied are *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), and *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223 (1850). Both cases involved claims brought by non-Indians. For example, *Johnson* v. *M'Intosh, supra*, addressed the issue of whether the plaintiffs, non-Indians who claimed title to land pursuant to a tribal conveyance, possessed title sufficient to defeat a claim by a person who had been granted the same land by the United States. In an opinion by Chief Justice Marshall, this Court held "that the plaintiffs do not exhibit a title which can be sustained in the courts of the United States." *Id.* at 604-605. Far from recognizing a cause of action on behalf of Indian tribes, this Court found that no cause of action could be maintained by the claimed grantee of Indian title.

Like *Johnson* v. *M'Intosh*, *Marsh* v. *Brooks*, *supra*, was an action of ejectment brought by non-Indians against non-Indians. The Court held that no title passed to the plaintiffs pursuant to a patent from the United States where the United States had previously granted a fee simple interest in the same land to Indian half-breeds. In the *dictum* upon which the panel majority placed primary reliance, the Court cited *Johnson* v. *M'Intosh*, *supra*, for the proposition "[t]hat an action of ejectment could be maintained on an Indian right to occupancy and use." *Id.* at 232. Not only did this Court not hold that such a federal common law action for possession existed, but it did not state who could maintain any action which might exist. Because both *Johnson* and *Marsh* were decided in the context of claims by non-Indians asserting the existence of Indian title, neither case supports the panel majority's holding that Indian tribes could maintain a possessory action on their own behalf.

Finally, the panel majority placed great reliance on this Court's earlier decision in this case. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974). All that this Court held in its 1974 decision was that the claims asserted by the plaintiffs raised issues

of federal law subject to the jurisdiction of federal courts. The Court was not then asked to decide whether the plaintiffs had stated a claim upon which relief could be granted. As this Court held:

> Enough has been said, we think, to indicate that the complaint in this case asserts a present right to possession under federal law. *The claim may fail at a later stage for a variety of reasons,* but for jurisdictional purposes, this is not a case where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation. . . .

Id. at 675 (emphasis added). *Cf. Burks* v. *Lasker,* 441 U.S. 471, 475-476 & n.5 (1979) ("The question whether a cause of action exists is not a question of jurisdiction, and therefore may be assumed without being decided.")[5] This Court's further statement that "[t]ribal rights were nevertheless entitled to the protection of federal law" did not elaborate on the manner in which, or the governmental branch by whom, such tribal rights are to be protected. The panel majority's reliance on this statement ignores the fact that, as will be demonstrated in greater detail below, Congress has acted with respect to tribal rights, and that it has established a comprehensive remedial scheme which excludes both the federal common law and the implied statutory causes of action which the panel majority has attempted to create.

B. *The Nonintercourse Act Preempts any Federal Common Law Cause of Action.*

Even assuming that there ever existed a federal common law cause of action, any federal common law cause of action was preempted by Congress' enactment of the Indian Trade and Inter-

[5] In *Burks* v. *Lasker,* this Court assumed, as had several courts before it, that an implied private right of action existed under § 206 of the Investment Advisers Act of 1940. 441 U.S. at 473 n.2, 475-476 & n.5. Six months later the Court held that no such implied private right of action existed. *Transamerica Mortg. Advisers, Inc.* v. *Lewis,* 444 U.S. 11 (1979). Thus, just as this Court's earlier decision in this case and other courts' assumptions do not require a finding of a right under federal common law, neither do they require a finding of an implied private right of action.

course Acts.[6] the panel majority's holding to the contrary not only is predicated upon the wrong legal standard, but also disregards the comprehensive and preclusive scope of the Trade and Intercourse Acts.

1. The Panel Majority Erroneously Applied the Legal Standard Governing Federal Preemption of State Law Rather than the Principles Governing Federal Statutory Preemption of Federal Common Law.

The panel majority held that the Trade and Intercourse Acts did not preempt any federal common law cause of action because the statutes "did not speak directly to the questions of the Indians' ability to enforce their possessory rights by an action in ejectment." (App. 218a.) The panel majority consequently .efused to "imply a congressional intention to extinguish the Indians' claimed common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire." (App. 219a.)[7] In so holding, the panel majority erroneously applied the strict standard governing federal preemption of state law rather than the more liberal standard governing congressional preemption of federal common law. As this Court held in *Milwaukee* v. *Illinois, supra*:

> [T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal

[6] The first Indian Trade and Intercourse Act was adopted on July 22, 1790, and contained in § 4 a provision invalidating any sale of Indian lands unless the sale was "made and duly executed at some public treaty, held under the authority of the United States." Act of July 22, 1790, c. 33, § 4, 1 Stat. 137, 138 ("1790 Act"). This section, which has been referred to as the Nonintercourse Act, is presently codified at 25 U.S.C. § 177. The Indian Trade and Intercourse Act was subsequently reenacted and sometimes modified. The various reenactments of the provisions regulating the sale of Indian land are found at: Act of March 1, 1793, c. 19, § 8, 1 Stat. 329 ("1793 Act"); Act of May 19, 1796, c. 30, § 12, 1 Stat. 469, 472 ("1796 Act"); Act of March 3, 1799, c. 46, § 12, 1 Stat. 743, 746 ("1799 Act"); Act of March 30, 1802, c. 13, § 12, 2 Stat. 139, 143 ("1802 Act"); Act of June 30, 1834, c. 161, § 12, 4 Stat. 729, 730 ("1834 Act"); Rev. Stat. § 2116; and, of course, 25 U.S.C. § 177.

[7] The panel majority's reasoning that the preemption of federal common law rights should be as "plain and unambiguous" as congressional extinguishment of Indian land titles is unpersuasive. The extinguishment of title is a complete and irrevocable abrogation of a tribal claim to land. The preemption of federal common law by a federal statute providing a congressionally crafted remedial scheme is not a complete extinguishment of remedies. Nor is it irrevocable, since Congress is always free to supplement the remedies it has provided or repeal the legislation and reinstate federal common law.

common law is not the same as that employed in deciding if federal law preempts state law. In considering the latter question "'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" . . . While we have not hesitated to find pre-emption of state law, whether express or implied, when Congress has so indicated, . . . or when enforcement of state regulations would impair "federal superintendence of the field," . . . our analysis has included "due regard for the presuppositions of our embracing Federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy.". . . *Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required.* Indeed, as noted, in cases such as the present "we start with the assumption" that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

Id. at 316-317 (emphasis added) (citations omitted).

The panel majority's reasoning that a federal common law cause of action exists because the Trade and Intercourse Acts "did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment" (App. 218a) also misconstrues this Court's holding in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978). In that case, the plaintiffs in a wrongful death action contended that federal common law should supplement the Death on the High Seas Act by allowing recovery for loss of society in addition to the pecuniary loss allowed by the statute. This Court rejected that argument, holding:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. . . . The Act does not address every issue of wrongful death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

Id. at 625. Thus, this Court held that, where Congress has addressed generally the issue of remedies, courts are not free to engraft additional remedies into the statutory scheme.

Application of the rationale of *Higginbotham* to the pending case compels the conclusion that although Congress, in enacting the Trade and Intercourse Acts, "did not speak directly" to the particular remedy the plaintiffs now seek, its silence does not create a judicial license to supplement the statute through the common law. Instead, it is sufficient for preemption purposes that in the Trade and Intercourse Acts Congress addressed the issue of unauthorized conveyances of Indian land and provided specific and comprehensive remedies for violations of the Acts. The absence of an express preclusion of federal common law rights or an express reference to tribal causes of action has no bearing on the issue of preemption, and the panel majority erred in holding otherwise.

2. The Trade and Intercourse Acts Are Comprehensive Statutes Which Preempt Federal Common Law.

Although it conceded that "the 1793 Act both authorized the intervention of the President and the federal government on behalf of the Indians, and established criminal penalties for violations of the Act," the panel majority concluded without explanation, that the "Trade and Intercourse Acts were not comprehensive statutes." (App. 218a). Accordingly, the panel majority reasoned, "[n]one of these statutory provisions expressly subsumed the common law modes of relief," *id.*; the Act did not preempt federal common law; and the courts consequently are free to supplement the statutory remedial scheme of the Trade and Intercourse Acts under the guise of the federal common law.[8] This holding is directly contrary to this Court's holding in *Milwaukee* v. *Illinois*, *supra*.

In *Milwaukee* v. *Illinois*, this Court held that the federal common law cause of action for abatement of a nuisance caused by

[8] This characterization apparently is the result of the panel majority judging the Trade and Intercourse Acts by present day standards. As Judge Meskill quite correctly states, however, "it is the intent of the 2nd Congress which we search for here, not the perceived views of a Congress elected many years later." (App. 253a-254a.) Although perhaps not comprehensive by today's standard, there can be little doubt that the Trade and Intercourse Acts, at the time of their enactment, were among the most comprehensive of early congressional enactments.

interstate water pollution was preempted by Congress' enactment of the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"). That statute regulated, *inter alia*, discharges of pollutants into interstate waters. This Court based its holding of federal preemption on the congressional intent that the Amendments be comprehensive, the delegation by Congress of water pollution standards to an administrative agency, and the establishment of a forum to which an aggrieved party could appeal for redress. All of these elements are present in the comprehensive remedial scheme of the Trade and Intercourse Acts.

(a). *The 1790 Trade and Intercourse Act.*

The first Trade and Intercourse Act became law on July 22, 1790.[9] Although the 1790 Act contained only six substantive sections, it established a broad regulatory scheme to govern contact between the Indian and non-Indian populations. Section 1 of the Act required any person wishing to trade with the Indians to obtain a license for that purpose from the Superintendent of Indian Affairs. As a condition of obtaining such a license, the trader was required to post a bond "in the penal sum of one thousand dollars, payable to the president of the United States." In the event that the trader violated any of the provisions of the Act or rules and regulations promulgated thereunder, the Superintendent was authorized to "put in suit such bonds as he may have taken, immediately on the breach of any condition in said bond." 1790 Act, § 2. In addition to regulating the activity of licensed traders, the Act provided that any unlicensed traders found doing business with Indian tribes would forfeit such merchandise as was in their possession, one half the proceeds of which would go to the United States, the other half to the benefit of the person initiating the prosecution of the unlicensed trader. 1790 Act, § 3.

In stark contrast to the substantial penalties for violations of the 1790 Act's provisions regulating traders, § 4 (which was the first version of the current Nonintercourse Act), established no penalties for conveyances of land made without the consent of the United States. Rather, section 4 simply declared that such conveyances would be invalid. Congress' failure to prescribe any enforcement mechanism for a violation of this section was consistent with the recommendations of Secretary of War Henry Knox

[9] Act of July 22, 1790, c. 33, 1 Stat. 137.

who, in his report of July 15, 1789, urged Congress to enact a "declarative law" recognizing the right of the Indians to possess their lands subject only to divestment by the United States. 1 American State Papers: Indian Affairs 53-55 (1834). Section 4 thus was simply a declaratory act devoid of any judicially enforceable remedies.

(b). *The 1793 Trade and Intercourse Act.*

Because the 1790 Act contained no penalty or provision to enforce the substantive provisions of the Nonintercourse Act, President Washington urged Congress "that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating [Indian] rights, shall infringe the treaties and endanger the peace of the Union." Third Annual Address of President George Washington, in 1 Messages and Papers of the Presidents, 105 (Richardson ed. 1896). Thus, President Washington clearly believed that the declaratory provision of the 1790 Act contained no accompanying remedies, express or implied.

In response to the President's plea, on March 1, 1793, Congress enacted a new Trade and Intercourse Act[10] which, for the first time, provided penalties for persons encroaching on Indian lands. As originally introduced, the 1793 Act proposed that a fine of $4,000 and twelve months imprisonment be imposed upon those who violated the Act's non-alienation provision. Acts and Resolutions of the Congress, 2d Cong., 1st Sess., Library of Congress, Washington, D.C. The Act subsequently was amended to make the negotiation of the purchase of any interest in Indian land without the approval of the United States a misdemeanor punishable by a fine not exceeding $1,000 and up to twelve months in prison. 1793 Act, § 8. Section 12 of the Act provided for the prosecution of actions to collect fines either by an informant's suit or by the United States.

[10] Act of March 1, 1793, c. 19, 1 Stat. 329. The 1793 Act was considerably more detailed than the 1790 Act both in terms of its substantive coverage and its enforcement provisions. For example, unlicensed traders, in addition to having their merchandise subject to forfeiture, now were also subject to a fine of up to $100 and imprisonment of up to thirty days. 1793 Act, § 3. In addition, the purchase of horses from Indians by a trader without a special license obtained from the Superintendent of Indian Affairs was forbidden upon pain of forfeiture of his bond and the imposition of up to a $100 fine. Those who purchased a horse with knowledge that it originally belonged to an Indian also were subject to forfeiture of the value of the horse. 1793 Act, § 6.

More importantly, the 1793 Act provided a means by which persons encroaching on Indian land could be removed. Section 5 of that Act, which was the predecessor of 25 U.S.C. § 180, authorized the President "to take such measures, as he may judge necessary, to remove" persons settling on Indian lands. The 1793 Act thus provided a mechanism by which persons wrongfully settling on tribal lands, as a result of an unauthorized conveyance or otherwise, could be removed, and interposed the President rather than the judiciary as the enforcer and arbiter of tribal land claims.

(c). *The 1796, 1799 and 1802 Trade and Intercourse Acts.*[11]

Despite the strengthening of the Trade and Intercourse Act in 1793, on January 30, 1794, President Washington complained that "[e]xperience demonstrates that the existing legal provisions are entirely inadequate. . . ." 1 American State Papers: Indian Affairs, *supra*, at 472. Thus, the issue of enforcement and remedies again surfaced in Congress' enactment of the 1796 Act.

Section 5 of the 1796 Act[12] bolstered the President's power to remove non-Indians from Indian land by expressly authorizing him to use military force. In addition, section 5 provided that any person settling upon Indian land shall "forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid. . . ." Upon forfeiture the "right, title or claim forfeited" vested in the United States and did not revert to the original Indian owner. The availability of this forfeiture remedy was short-lived; the forfeiture provision was deleted from the 1802 Act. Even given its limited life, however, the enactment and repeal of this forfeiture provision is particularly significant. Its existence demonstrated that Congress considered precisely the type of remedy the plaintiffs now claim, employed it for a time and ultimately rejected it.

[11] Although the pending case concerns transactions alleged to have been made in violation of the 1793 Act, the subsequent versions of the Trade and Intercourse Acts are involved in the land claims in which the *amici* are parties. In the *Catawba* case, the transfer to the State of South Carolina is alleged to violate the 1834 Act. In the *Cayuga* case, the 1793 and 1802 Acts are in issue. Accordingly, the issue of whether the post-1793 versions of the Trade and Intercourse Acts preempted the federal common law or implied a private right of action is of profound importance to the *amici*.

[12] Act of May 19, 1796, c. 30, 1 Stat. 469. In 1799, Congress reenacted a virtually identical Act (Act of March 3, 1799, c. 46, 1 Stat. 743), and in 1802 it again reenacted the Act (Act of March 30, 1802, c. 13, 2 Stat. 139), making a few changes in the remedial portions of the Act, discussed *infra*. No legislative history exists to aid in construction of the 1802 Act.

The 1796, 1799 and 1802 Acts also developed a comprehensive remedial scheme for handling private disputes between Indians and non-Indians. Section 4 of each of these Acts required non-Indians to compensate Indians for property taken or destroyed by them, in an amount equal to twice the value of such property. That section further provided that, if such offender was unable to pay a sum at least equal to the value of the property, the balance would be paid out of the treasury of the United States, subject to the Indians' obligation not to seek private revenge or satisfaction by force or violence.

If, on the other hand, an Indian left Indian country and stole or destroyed the property of a non-Indian, section 14 of each of these Acts provided an elaborate procedure for compensating the victim of the Indian's crime. The non-Indian was required to apply to the Superintendent of Indian Affairs, or such other person authorized by the President, "who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction." If the tribe failed to make satisfaction within a reasonable time, the superintendent or other authorized person would make "return of his doings" to the President, and forward to him the documents and proofs, allowing the President to take such further steps to obtain satisfaction as were necessary and proper.

> [A]nd, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guarantee to the party injured, an eventual indemnification: *Provided always*, that if such injured party, his representative, attorney or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification.

Section 14 of these Acts further provided that the President could deduct such sums from the annual stipend which the United States

was bound to pay to the tribe to which the offending Indians belonged.[13]

Thus, Congress established an elaborate mechanism for resolving civil disputes between Indians and non-Indians, and the forum for such dispute resolution was the executive rather than the judicial branch of government. This detailed scheme for enforcement and remedies belies the existence of other private remedies created only by implication.

(d). *1834 Trade and Intercourse Act.*

The present version of the Nonintercourse Act, passed in 1834, revised but retained the comprehensive remedies of earlier versions of the Act.[14] Section 10 of the 1834 Act authorized the Superintendent of Indian Affairs and his agents to remove all persons found illegally in Indian country, and authorized the President to use military force to assist in their removal. Section 11 retained the President's authority "to take such measures, and to employ such military force, as he may judge necessary to remove" persons making settlements on Indian lands. Section 12, which restricted the alienation of Indian lands, also was amended by expressly limiting the scope of the restraint to lands belonging to "any Indian nation or tribe of Indians." Congress also deleted from the Act the language making the unauthorized purchase of tribal land a misdemeanor, and removed the penalty of imprisonment, but retained the $1,000 fine, for such unauthorized dealings. Together with this amendment, Congress added section 27, which provided:

> [t]hat all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, *in the name of the United States*, . . . the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

[13] Section 15 of these Acts granted federal and territorial courts jurisdiction over "all crimes, offences and misdemeanors, against this act," § 16 made it lawful for the military to apprehend offenders found in Indian country, and § 17 provided that offenders could be apprehended and tried where found.

[14] Act of June 30, 1834, c. 161, 4 Stat. 729. The congressional reports describing the 1834 Act are silent on the issue of remedies. Report on Regulating the Indian Department, H. R. Rep. No. 474, 23d Cong., 1st Sess., May 20, 1834; Senate Doc. No. 72, Report from the Secretary of War, 20th Cong., 2d Sess., February 10, 1829. Congress' silence concerning the remedial intent underlying the Nonintercourse Act is of little import, for "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

(Emphasis added.) Again, Congress not only addressed the types of remedies needed to enforce the Act, but also established the manner in which these remedies would be implemented.

(e). *Summary of the Various Versions of the Trade and Intercourse Acts.*

The successive enactments of the Trade and Intercourse Act clearly establish a comprehensive and exclusive remedial scheme for regulating all forms of commerce with Indian tribes, both in chattels and in land. The Acts provided criminal penalties for violations, including fines and prison sentences, and some versions further mandated forfeiture by persons illegally occupying Indian lands. The Acts empowered the Superintendent of Indian Affairs to grant licenses and to apply to Indian tribes to make recompense to non-Indians for stolen or destroyed property. The President was empowered to take any necessary and proper action to ensure that satisfaction was made in such circumstances, and also was empowered, with the aid of the military, to remove settlers from Indian lands. The Acts also established criminal jurisdiction in federal and territorial courts to punish violations of the Acts.

The only basis upon which the panel majority relied in support of its contention that the Trade and Intercourse Acts "were not comprehensive statutes" is their failure to provide a private right of action to aggrieved Indian tribes. (App. 218a.) Congress' failure to do so, however, does not detract from its clear intent to occupy the field of Indian commerce. The absence of a private civil remedy in the wake of an otherwise detailed and comprehensive regulatory scheme evidences a clear intent by Congress that such private remedies be excluded. As this Court held in *Milwaukee* v. *Illinois*, *supra*:

> Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal'" when Congress has addressed the problem.

Id. at 315.

By enacting and amending the Trade and Intercourse Acts, Congress preempted the use of the federal common law to supplement its thoroughly considered and carefully drawn remedial scheme. The panel majority here erred when it ignored the manner in which "Congress has addressed the problem" of unauthorized alienation of Indian lands and, instead, judicially decreed that which accorded with its sense of the proper outcome.

II. The Panel Majority Erred in Holding that an Implied Private Cause of Action Exists Under the Nonintercourse Act.

Based upon the perceived intent of Congress in enacting the Nonintercourse Act to protect the rights of Indian tribes to their property, the panel majority incorrectly held that the plaintiffs have an implied private right of action under the Nonintercourse Act. (App. 219a-231a). The panel majority reached this conclusion despite its concession that "the legislative history of the Nonintercourse Acts . . . furnishes no clear expression on the question of whether Congress intended to create a private right of action for damages." (App. 223a.) In so holding, the panel majority ignored the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra,* 444 U.S. at 19-20.

A. *The Panel Majority Inappropriately Inferred a Private Cause of Action Because of its Dissatisfaction with Executive Branch Enforcement of the Act.*

The apparent motivation for the panel majority's eagerness to infer a private right of action is its dissatisfaction with the efforts of the executive branch during the past two hundred years to fulfill its enforcement responsibilities under the Act:

> Private enforcement has also been favored because of the federal government's poor performance of its statutory obligation to protect the Indians. The congressional directives embodied in the Nonintercourse Acts frequently have been disregarded by the executive branch. . . . Thus, by necessity, Indian tribes have been permitted to enforce the Acts.

(App. 221a-222a) (footnotes and citation omitted). *See also* App. 230a ("A private right of action is necessary in view of the virtually complete failure of other statutory remedies to provide the Indians with any real protection."). In an analogous context, this Court held in *Milwaukee* v. *Illinois, supra*:

> Although a federal court may disagree with the regulatory approach taken by the agency with responsibility for issuing permits under the [FWPCA], such disagreement alone is no basis for the creation of federal common law.

451 U.S. at 323. Neither is a court's dissatisfaction with the actions of a coordinate branch of government sufficient basis for inferring a private right of action absent a clear manifestation of congressional intent that such a cause of action be implied.[15]

B. *The Panel Majority Misconstrued the Significance of* Transamerica Mortgage Advisors, Inc. *v.* Lewis.

In finding that Congress intended the Nonintercourse Act to include an implied right of action, the panel majority placed heavy reliance on *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). In *Transamerica*, this Court held that one section of the Investment Advisers Act of 1940 contained an implied cause of action, but also found that another section of the same Act did not. The panel majority relied on the wrong portion of this Court's holding in construing the Nonintercourse Act.

Section 215 of the Investment Advisers Act declared "that contracts whose formation or performance would violate the Act 'shall be void . . . as regards the rights of' the violator and knowing successors in interest." *Transamerica, supra* at 16-17.

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[15] The panel majority's express dissatisfaction with executive enforcement of the Act raises precisely the spectre of disregard for the commitment of an issue to a coordinate political branch and of embarrassment from multifarious pronouncements of various branches of federal government which render private Indian land claims nonjusticiable political questions. *See Baker* v. *Carr*, 369 U.S. 186 (1962). The panel majority's inference of a private right of action constitutes a usurpation of the power to regulate Indian affairs which Congress, in the various Trade and Intercourse Acts, expressly delegated to the executive branch. Rather than brief the political question issue in a separate section, the *amici curiae* will rely on the discussion herein and the discussion of the issue contained in the non-state petitioners' brief.

Because section 215 was merely declaratory, and Congress had not provided any administrative or judicial remedies to enforce that portion of the statute, this Court found a congressional intent "that the issue of voidness under its criteria may be litigated somewhere." *Id.* at 18. Relying exclusively on twentieth-century authorities, as well as on the grant of equity jurisdiction contained in section 214 of the Act, this Court held that Congress intended to allow the private parties to bring actions for rescission, restitution and injunctive relief under section 215 of the 1940 statute. *Id.* at 18-19.

In contrast, the Court refused to recognize an implied private cause of action under section 206, which proscribed fraudulent practices by investment advisers. In language that could almost equally apply to the Nonintercourse Act, this Court held:

> Congress expressly provided both judicial and administrative means for enforcing compliance with § 206. First, under § 217, 15 U.S.C. § 80b-17, willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action."

Transamerica, supra at 20.

As with section 206 of the Investment Advisers Act, Congress, in enacting the 1793 and subsequent versions of the Trade and Intercourse Act, specifically provided various remedies to enforce the non-alienation provision. These remedies included fines and imprisonment as well as authority in the President to remove trespassers from tribal land or to institute suit on behalf of Indian tribes. Although the panel majority recognized that "[t]hese upgraded remedies were designed to correct the perceived shortcomings of the 1790 statute," it failed to recognize the analogy to section 206 of the Investment Advisers Act. Its failure to do so resulted in a misplaced reliance on the first part of this Court's holding in *Transamerica* and its failure to recognize that the

remaining portion of the *Transamerica* holding compels the conclusion that Congress did not "absentmindedly [forget] to mention an intended private action." *Id.* at 20.

C. *The Panel Majority Ignored the Historical Context in Which the Nonintercourse Act Was Enacted.*

At the time the Trade and Intercourse Acts were enacted, Indian tribes lacked capacity to maintain suit in federal courts. As Chief Justice Marshall states in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831):

> At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union.

30 U.S. (5 Pet.) at 18. *See also id.* at 20 (Indian tribes "cannot maintain an action in the courts of the United States"). Indeed, as the very commentator cited by the panel majority explained:

> [A] further consequence of the decision in *Cherokee Nation* was that tribal claims regarding state interference with their land could not be brought in federal court until the late 19th century.

Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Indian Land Claims, 31 Me. L. Rev. 17, 47 (1979). *See also Jaeger* v. *United States*, 27 Ct. Cl. 278, 282, 285 (1892) (courts not open to Indians absent special enabling legislation). Surely the same principles that influenced the framers of the Constitution led the drafters of the Trade and Intercourse Acts to conclude that Indian tribes would not have resort to courts of law to enforce their rights and, therefore, required other and different remedies.

The panel majority summarily dismissed this crucial point by offering that the reasons that Indian tribes did not resort to courts

were "cultural, not legal." (App. 224a, n.9.) Whatever the reasons, even the panel majority must concede that at the time the 1793 Act was passed, it was inconceivable to lawmaker and Indian alike that the rights conferred by that Act would be enforced by private civil litigation. It is the understanding of those formulating the statute, and not the reasons underlying that understanding, which is dispositive.

D. *The Nonintercourse Act Was Not Enacted Primarily for the Benefit of Indian Tribes.*

In addition to misconceiving the historical context in which Congress acted, the panel majority also placed heavy reliance on its conclusion that the Nonintercourse Act was enacted especially for the benefit of Indian tribes. In fact, protection of tribal rights was only a secondary concern of Congress. The primary purpose of the Nonintercourse Act was the preservation of peace, and protection of the Indians was only a means to this end. *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (purpose of 1790 Act "to prevent destructive retaliations by the Indians"); *Mohegan Tribe* v. *Connecticut*, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) ("it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions"). According to one leading authority:

> The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the Whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature — aimed largely at restraining the actions of the Whites and providing justice to the Indians as the means of preventing hostility.

F. Prucha, American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834, 3 (1962). Indeed, an earlier decision by the same court of appeals that decided this case recognized this preeminent policy of maintaining peace:

> tain concessions were granted to the Indian tribes in order to avoid the necessity for large-scale military intervention.
>
> . . . The evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them, and . . . quite readily demonstrates that contemporary attitudes have colored our views of the original motives behind American Indian policy. . . .

Mohegan Tribe v. *Connecticut*, *supra*, 638 F.2d at 622. *See also Mashpee Tribe* v. *Watt*, 542 F.Supp. 797, 803 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir.), *cert. denied*, 104 S.Ct. 555 (1983). ("The major purpose of the Nonintercourse Act was to prevent Indian uprisings and preserve the peace along the frontier.") Indeed, the title of the 1796 and subsequent Acts was "An Act to regulate Trade and Intercourse with the Indian Tribes, *and to Preserve peace on the Frontiers*." (Emphasis added.)

Thus, at most, the Nonintercourse Act served the dual purpose of protecting tribal rights to land as a means of achieving the greater public purpose of preserving peace. Under such circumstances, this Court has directed that courts should be careful not to infer a private cause of action which serves only one of the dual purposes. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 64 (1978). In this critical respect, the Act is indistinguishable from the criminal statute held not to imply a private right of action in *Cort* v. *Ash*, 422 U.S. 66 (1975). That statute, 18 U.S.C. § 610, prohibited corporations from making "a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors . . . are to be voted for." In holding that a stockholder in a corporation could not maintain an action to enjoin the corporation from violating the statute by making campaign expenditures, this Court stated:

> [T]he legislative history . . . demonstrates that the protection of ordinary stockholders was at best a secondary concern. Rather, the primary purpose of the . . . Act, . . . was to assure that federal elections are "'free from the power of money'" . . . to eliminate "'the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions.'"

422 U.S. at 81-82 (footnote omitted). Thus, this Court found that the plaintiff was not a member of a class for whose especial benefit the legislation was enacted because the statute was directed toward a greater public purpose. *See also Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 421 (1975) (although "Congress' primary purpose in enacting the [Securities Investor Protection Act of 1970] . . . was, of course, the protection of investors . . ., [i]t does not follow . . . that an implied right of action by investors who deem themselves to be in need of the Act's protection, is either necessary to or indeed capable of furthering that purpose").

This Court again applied this principle in *California* v. *Sierra Club*, 451 U.S. 287 (1981). In holding that private plaintiffs could not bring suit to enforce the Rivers and Harbors Appropriation Act of 1899, which established criminal penalties and empowered the Secretary of War to take action against illegal obstructions in navigable waterways, the Court made it clear that "[t]he question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *Id.* at 294. The Court went on to say:

> Neither the Court of Appeals nor respondents have identified anything in the legislative history suggesting that § 10 was created for the especial benefit of a particular class. On the contrary, the legislative history supports the view that the Act was designed to benefit the public at large by empowering the Federal Government to exercise its authority over interstate commerce with respect to obstructions on navigable rivers caused by bridges and similar structures.

Id. at 294-295.

Like the statutes construed in *Cort* and *Sierra Club*, the Nonintercourse Act involved a greater public purpose than the protection of Indian rights in land: the prevention of war through regulation of the relations between Indians and white settlers. Certainly Indians would incidentally benefit from the Act to the extent that dealings unsupervised by the United States were deterred and punished by the Act's criminal penalties, and to the extent that the executive branch of the government acted to protect Indian lands from encroachment and to resolve disputes between Indians and non-Indians. But "[t]he question is not simply who would

benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California* v. *Sierra Club, supra*, 451 U.S. 294. As this Court held in *Transamerica Mortg. Advisors, Inc.* v. *Lewis, supra*:

> Section 206 of the [Investment Advisers Act] concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. . . . The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.

Id. at 24.

The Trade and Intercourse Acts delegated to the executive branch the principal responsibility of vindicating tribal interests and thereby preserving the peace. Through their design, the President was established as the principal intermediary between Indian and non-Indian. It was Congress' determination that the executive branch was most capable of insulating each group from the violence of the other and, therefore the judiciary's role was limited to prosecutions of the criminal offenses the Acts established. The panel majority's apparent dissatisfaction with the executive's fulfillment of its responsibilities can afford no basis for disturbing that congressional determination. Because an implied private right of action finds no basis in congressional intent, the panel majority's decision should be reversed.[16]

[16] The panel majority also cites certain lower court decisions which have assumed the existence of a private right of action under the Nonintercourse Act. (App. 221a) (citing *Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780, 784 (D. Conn. 1976), and *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Dev. Corp.*, 418 F.Supp. 798, 805 n.3 (D.R.I. 1976)). However, the issue of the existence of an implied right of action was not raised in any of these cases and therefore these decisions provide no support for the panel majority's holding. *Compare Burks* v. *Lasker, supra with Transamerica Mortg. Advisors, Inc.* v. *Lewis, supra.*

III. Even if a Federal Common Law Claim or Implied Private Right of Action Existed, Indian Land Claims Are Subject to Analogous State Statutes of Limitation.

No federal statute of limitation applies to private actions by Indian tribes under the Nonintercourse Act.[17] Consequently, the most nearly analogous statute of limitation of the forum state should be "borrowed" and applied to the plaintiffs' claims, if any such claims are held to exist. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395 (1946). *Cf. Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979) (borrowing state boundary law to satisfy expectations of private landowners in dispute with Indian tribe). The only basis for refusing to borrow state statutes of limitation is "if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977).

In order to avoid this Court's mandate to apply the most closely analogous state statute of limitation, the panel majority cursorily concluded that a time-bar on private actions would contravene the policies of the Nonintercourse Act. Without analyzing the purposes and remedial structure of the Trade and Intercourse Acts, the panel majority simply declared that a limitation on private actions "would permit a violation of the 1793 Act to go unremedied and thus would be patently inconsistent with the Trade and Intercourse Acts." (App. 232a.) The panel majority also offered its belief that "[i]t would be anomalous to allow [the United States as] trustee to sue under more favorable conditions that [*sic*] those afforded the tribes themselves." *Id.* (quoting *Oneida Indian Nation* v. *New York, supra*, 691 F.2d at 1083-1084). Both assertions are invalid.

First, a time limitation on private actions does not mean that violations will, in all cases, go unremedied. The United States, as trustee, still may bring suit on behalf of allegedly wronged tribes to enforce violations of congressional restrictions on alienation of Indian lands. *Wilson* v. *Omaha Indian Tribe, supra*, 442 U.S. at 657 n.1. Moreover, if the United States fails to fulfill its "trust" obligation with regard to tribal land, the tribe may attempt to seek compensation from the federal government. *See United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 386 (1980); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351, 359 (1926). Finally, all statutes of limitation embody the determination that, at some point,

[17] The court of appeals recognized that the express language and extensive legislative history of 28 U.S.C. § 2415 preclude its application to suits by tribes.

possible wrong-doing should no longer be remediable. The panel majority made no attempt to explain why this fundamental principle of repose should not apply to land claims that are nearly two centuries old and, potentially, massively disruptive.[18]

Second, there is no anomaly in allowing the guardian broader powers than its ward in claims asserted under the Nonintercourse Act. As is discussed in more detail above, Congress resolved the delicate problem of relations with the Indian tribes by vesting primary responsibility for the Indians with the executive branch of government. The executive consequently was provided broad powers and great discretion to determine whether and in what manner Indian land claims should be resolved. It is entirely consistent with this statutory scheme for the United States to have broader remedial powers than those reserved to the tribes and to be able to pursue land claims when an Indian claimant could not.[19]

Thus, arguments based on the notion that time-bars on private actions are somehow logically inconsistent with the protections afforded by the Nonintercourse Act must fail. The usual rule governing federal claims — recourse to the most closely analogous state statute of limitation if no federal statute exists — applies to private actions, if any exist, under the Nonintercourse Act. The panel majority erred in holding otherwise.

IV. Subsequent Federal Ratification of an Indian Land Transfer Need Not be "Plain and Unambiguous."

The panel majority also incorrectly held that subsequent federal ratification of an Indian land transfer must be "plain and unambiguous." (App. 236a.) In so holding, the panel majority relied principally upon *United States* v. *Santa Fe P.R. Co.*, 314 U.S. 339 (1941). That decision, however, considered whether a federal statute had the effect of extinguishing Indian rights in land which had never been voluntarily conveyed by the Indian claimant. As such, *Santa Fe* is not applicable to the question of whether the government has retroactively recognized the validity of a previous voluntary tribal

[18] The Oneidas engaged in numerous efforts to obtain redress for their grievances during the nineteenth and twentieth centuries, including several petitions to the federal government. (App. 60a). There is, therefore, no excuse for the plaintiffs' delay in bringing suit, assuming that a cause of action was available to them.

[19] In an analogous context, private plaintiffs under the federal securities laws are subject to borrowed state statutes of limitations while the Securities and Exchange Commission is not. *Compare Be[illegible] Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402, 406-409 (2d Cir. 1975), *with Securities & Exchange Comm'n* v. *Penn. Cent. Co.*, 425 F.Supp. 593, 599 (E.D. Pa. 1976).

conveyance. Courts that have confronted that question have recognized that the rationale behind a "plain and unambiguous" requirement is inapposite and, consequently, have held that subsequent ratification can be inferred from actions of the federal government indicating knowledge and approval of the conveyance in question.

For example, *Seneca Nation of Indians* v. *Christy*, 126 N.Y. 122 (1891), *writ of error dismissed*, 162 U.S. 283 (1896), involved a sale of land by the Senecas, consummated at a treaty conducted under the authority of New York State. A statute enacted by Congress twenty years after the conveyance authorized deposit of the sale proceeds in the United States treasury, to be kept in trust for the Indians. The statute contained no express ratification of the treaty. The New York Court of Appeals held that the transfer, otherwise void under the Nonintercourse Act, was valid due to subsequent federal ratification. This act of recognition was sufficient to validate the sale, even though there was no express approval of the transfer at the time of the conveyance or thereafter. *Id.* at 146-147.

Similarly, the court of claims has held that "explicit recognition and implicit ratification" of a land transfer satisfies the federal consent requirement of the Nonintercourse Act. *Seneca Nation* v. *United States*, 173 Ct. Cl. 912, 915 (1965). In that case, New York State had taken tribal land by eminent domain in 1858 or 1859, for which the Senecas received monetary compensation without protest. A federal statute enacted in 1927 included a proviso explicitly referring to the lands previously acquired by the state through the condemnation proceedings. Because this statement clearly indicated awareness of the transfer, the court of claims inferred "subsequent acceptance and confirmation." *Id.* at 916.

The Nonintercourse Act seeks, in part, to protect Indian tribes from fraud or overreaching by subjecting all land transfers to federal scrutiny. Armed with knowledge of a conveyance, the government, as guardian, can undo the errors of its wards if necessary to avoid injustice. *See Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960). Knowledge thus is the critical requirement. Once it is clear that the federal government is aware of a particular transaction, its approval — even if only tacit — should be inferred from its inaction. Indeed, no more would be expected when the federal government consents to a conveyance at which it is present through an authorized representative. *See Federal Power Commission* v. *Tuscarora Indian Nation*, *supra*, 362 U.S. at 123 (congressional consent to taking of Indian land inferred from general

language of Federal Power Act); *United States* v. *National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944) (finding subsequent federal approval of tribal mineral leases from circumstantial evidence).

The panel majority's reliance upon decisions concerning extinguishment of tribal rights never previously conveyed by the Indian claimant are inapposite. Although the federal government possesses the power unilaterally to terminate tribal interests in land, *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), the federal government must state its intention to do so with clarity.[20] Absent such clarity, it is not possible to determine whether the United States intended to abrogate recognized or aboriginal rights of occupancy.

Subsequent approval of an executed transaction, however, need only involve knowledge and passive acquiescence. In these circumstances, the United States is not terminating any existing tribal right but, instead, merely is indicating its approval of a prior transaction by which the Indian claimants voluntarily conveyed away their rights. The rationale applicable to unilateral declarations of extinguishment has no bearing on subsequent ratification of voluntary Indian conveyances and therefore, ratification does not require the "plain and unambiguous" statement indicated by the panel majority.

[20] The Oneidas exaggerate the degree of explicitness that is required for the extinguishment of tribal rights. Background circumstances and legislative history may supply the requisite clarity in the absence of explicit language. *See Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977) (statutes disestablishing reservation need not expressly so state).

Conclusion.

For all of the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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